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# In the Supreme Court of the United States

OCTOBER TERM, 1957

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No. 414

CATHERINE S. WEINSTEIN, ADMX., ETC., PETITIONER

*v.*

UNITED STATES OF AMERICA

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JOSEPH J. ALESSANDRINE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 244 F. 2d 68.

### JURISDICTION

The judgments of the Court of Appeals were entered on May 3, 1957. On July 28, 1957, Mr. Justice Brennan extended the time within which to file a petition to and including August 31, 1957. The petition was filed on August 30, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether the adoption and enforcement of revenue regulations requiring the closing of the buildings, or the failure, either by regulation or order, to require ventilation fall within exceptions to the Tort Claims Act.

2. Whether the authority granted the Secretary of the Treasury over alcohol plants and warehouses imposed a duty cognizable under the Tort Claims Act to provide for the safety of the plant's employees.

## STATUTES INVOLVED

1. Section 5305 of the Internal Revenue Code of 1954 provides:

> The Secretary or his delegate shall issue regulations respecting the establishment, bonding, and operation of industrial alcohol plants, denaturing plants, and bonded warehouses authorized by this subchapter, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose on the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products.

2. 28 U. S. C. 1346 (b) provides:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

3. 28 U. S. C. 2680 provides in pertinent part:

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(c) Any claim arising in respect of the assessment or collection of any tax or customs

duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

* * * * *

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

* * * * *

STATEMENT

Section 5305 of the Internal Revenue Code of 1954 (*supra*, p. 2) directs the Secretary of the Treasury to issue regulations respecting the operation of industrial alcohol plants and bonded warehouses to secure the revenue, and to prevent the diversion of alcohol to illegal uses. Acting under this authority, the Secretary of the Treasury has issued detailed regulations which are published in 26 CFR, Part 182.

These regulations provide among other things that industrial alcohol bonded warehouses and denaturing plants shall be under the control of the assistant regional commissioner (26 CFR 182.470, 182.683). *Warehouses* are to be locked with Government locks at all times except when alcohol is being entered into, or removed from them, or when the proprietor needs to have access for the purpose of making repairs or for some other legitimate purpose (26 CFR 182.41, 182.474, 182.475). *Denaturing plants* are to "be kept closed and the doors securely locked except when work incidental to the operations of the plant is being carried on" (26 CFR 182.683). The regulations permit openings in the outside of the wall, roof, and floors of

industrial alcohol plants for ventilation and heating purposes, provided such openings are protected by gratings or bars (26 CFR 182.24).

Albert Weinstein and Joseph J. Alessandrine were employed by Publicker Industries, Inc., which operates an industrial alcohol denaturing plant and bonded warehouse in Philadelphia, Pennsylvania. On May 26, 1955, at about 8:15 a. m., an explosion occurred in Building No. 160 of Publicker Industries in which the denaturing plant and bonded warehouse were located (Pet. 3). The explosion killed an officer of the Internal Revenue Service and three employees of Publicker Industries including Albert Weinstein. A number of Publicker employees, including petitioner Alessandrine, were injured.

The amended complaints (App. 3a–7a)[1] allege that Weinstein was killed, and Alessandrine was injured, as the result of the negligence and wrongful acts and conduct of the United States and its agents acting within the scope of their employment "as hereinafter more particularly set forth" (Par. 4, App. 3a). In particularizing the basic charge of negligence, petitioner alleged that the United States supervised and controlled Building No. 160, requiring it to be locked from 4:30 p. m. to 8 a. m. (Par. 5, App. 4a);[2] that the closing of the building during those hours caused a large accumulation of explosive fumes, which, as the United States knew or should have known, was dan-

[1] App. refers to the Appendix to Appellants' (Petitioners here) brief in the Court of Appeals.

[2] *I. e.*, when the plant was not in operation, cf. 26 CFR 182.683, *supra*, p. 4.

gerous to the persons employed in the building (Par. 6, App. 4a); and that the United States was negligent in failing to take the proper precautions for the employees working in or about the building (Par. 7, App. 4a). Petitioners charge in particular that the United States negligently failed (Par. 8, App. 4a–5a):

> (a) to require and promulgate orders and regulations relating to proper ventilation air space and air circulation;
>
> (b) to post a watchman and guard;
>
> (c) to exercise the degree of care necessary in the circumstances;
>
> (d) to issue specific and detailed instructions to its employees relating to safety

and to require, under its regulatory powers, that the building be maintained so as to secure the highest degree of ventilation of air space and air circulation (Par. 9, App. 5a). Par. 10 (App. 5a) finally "notified" defendant that petitioners would not be confined to those specified acts of negligence but that they expected to rely additionally and independently upon the general allegations of negligence.

The United States moved to dismiss the amended complaint on the grounds that the complaint came within the exceptions of 28 U. S. C. 2680 (a), (c) and (i), that a private party would not be liable in the circumstances; that, if any duty was owed to petitioners, it was owed by Publicker Industries and not by the United States; and that petitioners were entitled to relief under the Pennsylvania Workmen's Compensation Statutes (App. 7a–8a). The District

Court granted this motion (App. 11a). A motion to vacate was denied (App. 12a).

The Court of Appeals affirmed the decision of the District Court (Pet. 14–20). It held that the nature of the Government's supervision and control under the Internal Revenue Code and the regulations was not such as to impose upon the Government the special duties and liability of a possessor of property, responsible for the safety of the occupants of the building. Apart from this ruling denying the existence of any tort liability, the Court of Appeals held that the complaints merely alleged inadequacies of the existing regulations, and failure to issue more and better regulations which came squarely within the two exceptions of 28 U. S. C. 2680 (a). The alleged negligence thus consisted either in acting in accordance with existing regulations, even though allegedly inadequate, or in the failure to promulgate further regulations, plainly a discretionary function (Pet. 18–20). The court left open the question whether liability was also barred under 28 U. S. C. 2680 (c) and (i) (Pet. 19–20, fn. 4).

## ARGUMENT

1. Insofar as affirmative acts constitute the basis for liability asserted in the complaints, the sole facts alleged are the adoption and enforcement of regulations requiring the premises to be locked. This, allegedly, resulted in the accumulation of fumes and vapors dangerous to persons working in or about the buildings (App. 3a–5a). Wholly apart from whether the regulations in fact provide any basis for such an

allegation,[3] it is clear that Congress exempted the adoption and enforcement of regulations from the scope of the Tort Claims Act. However *Dalehite* v. *United States*, 346 U. S. 15, may have been modified by *Indian Towing Co.* v. *United States*, 350 U. S. 61, and *Rayonier, Inc.* v. *United States*, 352 U. S. 315, nothing has been suggested which would limit the holding that the exercise of the type of discretion involved in the issuance of official regulations does not give rise to liability. 346 U. S. at 43. On that issue, the dissent in *Dalehite* also does not disagree. 346 U. S. 57–58. With respect to the affirmative actions of government agents to enforce the regulations, the only allegation here is that they carried out the regulations as enacted. The complaints charge that employees of the United States "caused said building to be locked daily for a period commencing four thirty o'clock P. M. and eight o'clock A. M. of each day, during which time operations in the plant were prohibited." (App. 4a.) Such action falls within the exemption provided for acts "in the execution of a statute or regulation, whether or not such statute or regulation be valid * * *." 28 U. S. C. 2680 (a). Here again the issue is not affected by *Indian Towing* and *Rayonier*, where the alleged negligent action was not action re-

[3] As pointed out above, the regulations do not prohibit the installation of appropriate vents for ventilation (*supra*, p 4). Moreover, if the owner determined that some of its employees should have access to the plant after hours in order to perform work necessary to proper ventilation, the regulations do not stand in the way since such operations would constitute "work incidental to the operation of the plant." See 26 C. F. R. 182.683, *supra*, p. 4.

quired by official regulation. To permit tort liability for actions by government employees required of them by regulation would result in testing the legality of rules and regulations through the medium of damage suits, a process which Congress clearly did not intend. See H. Rept. 1287, 79th Cong., 1st sess., pp. 5–6; H. Rept. 2245, 77th Cong., 2d sess., p. 10.

In addition to the exemption provided by 28 U. S. C. 2680 (a), the exemptions provided by subsections (c) and (i) of the same section specifically exclude these claims since they arise from the tax and fiscal functions of the treasury agents.

2. The question remains whether, assuming there is no liability for the affirmative acts of locking up the buildings, liability can be imposed by reason of the failure of the United States, either by regulation or by instructions or orders, to require ventilation to remove a dangerous condition. This also falls within the discretionary exemption, but, even more fundamentally, there would be no tort liability even against a private person for the failure to act since there was no duty to the persons involved to take action. Under the specific provisions of the Tort Claims Act, *supra*, p. 3, local tort law controls: in this case, Pennsylvania law. The Pennsylvania courts have stated that "It is fundamental that negligence and liability therefor cannot be predicated upon a state of facts which does not impose any legal duty." *Zayc, Admr.* v. *John Hancock Ins. Co.*, 338 Pa. 426, 430. See also *Stevens* v. *Reading St. Railway Co.*, 384 Pa. 390, 402. The function of the treasury agents on the premises was not to run the plant or to enforce safety regulations,

but to protect the revenue.[4] This was their sole function and, in carrying it out, they had no duty to act for the protection of the plant employees. As this Court said in *United States* v. *Witten*, 143 U. S. 76, 78–79:

> If he [the owner of the distillery] was not satisfied with the security of the warehouse, he had only to take any measure, consistent with the access and supervision of the revenue officers, to make it more secure, or else to pay the tax and remove the spirits. The only duty the revenue officers owed in regard to the security of the warehouse and the safekeeping of the spirits therein was to the government, * * *.

If the function of the agents had been to enforce safety standards in an operation subject to government control, there might perhaps be some basis for drawing an analogy to the lighthouse operations of *Indian Towing* or the fire fighters of *Rayonier*. But here it is clear that no safety inspection was involved. In fact it is the failure to assume such a function that is the real basis for the complaint.[5] Therefore, under Pennsylvania law, there being no duty to take affirm-

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[4] The allegations in the complaints that agents of the United States "supervised and controlled the building" (App. 4a) must be read in the light of the admission that these agents were Treasury inspectors acting solely pursuant to the Internal Revenue Code (Pet. 14). Petitioners concede that they were business invitees (Pet. 7). Thus, they were not engaged in manufacturing alcohol, but in protecting the revenue with relation to Publicker's operation of its plant.

[5] *Cf. Goodwill Industries of El Paso* v. *United States*, 218 F. 2d 270, 272 (C. A. 5) holding that the United States cannot be held "liable in tort for failure to provide adequate police protection within the domain of the state of Texas * * *."

ative action, there was no liability for a failure to act.

3. The petitioners complain that the court below gave too restricted an interpretation to the allegations of their complaints (Pet. 10–11). Their assertion appears to be that the language of their pleadings was sufficiently broad and indefinite to permit proof of acts of negligence not covered by the exceptions in the Tort Claims Act or of omissions to act with respect to matters as to which they had a duty to act. Admittedly the language of the complaints is far from precise (App. 3a–5a). However, on a fair reading of these paragraphs, we submit the courts below were entirely justified in their interpretation. Nor did the petitioners seek permission to amend their complaints further to allege additional facts as a basis for liability. In any event, whether or not the two courts were correct, the proper construction of these particular pleadings is not a question of general importance justifying review by this Court.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1957.